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82-424

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

FRANK MASCALI CONSTRUCTION G.C.P. CO. and
FRANK MASCALI CONSTRUCTION CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Do Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act impose liability on an employer for a union's independent acts of discrimination against an employee where the employer had no knowledge of and could not have learned of the union's actions?

II. Can the National Labor Relations Board, pursuant to the National Labor Relations Act Section 10(c), hold an employer secondarily liable for back pay where it finds the union primarily liable for having discriminated against employees and finds the employer had no knowledge of and could not have found out about the union's action?

III. Is there substantial evidence in the record as a whole to support the Board's finding that the employer delegated hiring authority to the union?

IV. Did the Board impermissibly pyramid inference upon inference to find that the employer delegated hiring authority to the union?

PARTIES IN THE COURT OF APPEALS

1. Frank Mascali Construction G.C.P. Co.*
2. Frank Mascali Construction Co., Inc.*
3. National Labor Relations Board
4. John Kuebler
5. Charles Curd
6. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

*Frank Mascali Construction Co.,Inc. is the managing partner of, and owns a one-third interest in Frank Mascali Construction G.C.P. Co., a joint venture.

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Appendix*

(National Labor Relations Act, 29 U.S.C. Sections 158(a)(1)(3) and 160(c).

*Petitioner relies on the Appendices filed herein by petitioning union Local 282 I.B.T. Docket No. 82-94, together with the additions contained in this Appendix.

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ORDERS BELOW

The order of the Court of Appeals has not been reported. That decision affirmed an order of the National Labor Relations Board, 251 NLRB 219 (1980). Both orders are included in Appendix A of Local 282, I.B.T.'s petition for certiorari, Docket No.82-94.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended, 29 USC 160(f). This Court extended petitioner's time to file a petition for writ of certiorari to September 11, 1982 by order dated July 15, 1982.

The jurisdiction of the U.S. Court of Appeals was invoked under Section 10(e) of the National Labor Relations Act, 29 USC 160(e).

STATEMENT OF THE CASE

This Petition seeks review of an Order by the United States Court of Appeals for the Second Circuit enforcing an order of the National Labor Relations Board. These orders impose vicarious liability on Frank Mascali Construction G.C.P. Co. ("GCP") and Frank Mascali Construction Co., Inc. ("Mascali") for discriminatory job referrals made by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 282" or the "Union"). Although the Union made these referrals to GCP, neither GCP nor Mascali knew of the Union's discrimination nor had the ability to discover the Union's unfair labor practice.

In addition, pursuant to Section 10 (c) of the National Labor Relations Act, as amended, GCP and Mascali are held liable for back pay due to employees for

acts of discrimination for which the Union was found individually responsible. Section 10(c), as amended, specifically limits the imposition of liability to the responsible party.

GENERAL BACKGROUND

This proceeding was initiated upon charges filed with the NLRB against GCP, Mascali and Local 282.

Early in 1977, GCP needed trucks and drivers. GCP decided to rent trucks with drivers from other contractors, which is a very commonplace practice in the construction industry.

McFarland, Local 282's Business Agent, was concerned that GCP might hire owner-operators rather than Local 282 drivers. He met with GCP. GCP informed McFarland that it would hire trucks and drivers first from Mascali, then from three other contractors: Willets, then Edenwald, then Grace, and then from any

available source, see Appendix A to Local 282's petition for certiorari, docket no. 82-94 (hereinafter "282 Appendix"), pages 47a-50a.

Mascali, Willets, Edenwald and Grace were all parties to collective bargaining agreements with Local 282. These agreements required that drivers work in the order of their seniority.

The Board found: That since referrals of drivers from Willets were handled by Local 282's shop steward, Worhacz, GCP delegated hiring authority to Worhacz, and that because Worhacz was the shop steward, GCP had delegated hiring authority to the Union;

that Worhacz discriminated against one of Willets' drivers, John Kuebler, by denying him referrals to GCP to which he was entitled under the seniority system;

that Willets knowingly delegated

hiring authority to Worhacz, yet Willets is blameless for Worhacz' discrimination;

that GCP and Mascali had no knowledge of Worhacz' discrimination against Kuebler and that even if they had investigated, they could not have found out about his discriminatory acts.

The Board held the Union liable for the discriminatory actions of its shop steward, found that the Union had committed unfair labor practices, and held it primarily liable for back pay.

The Board ruled that Mascali and GCP were liable because they had delegated hiring authority to the Union, found that they had committed unfair labor practices, and held them secondarily liable for back pay.

The United States Court of Appeals for the Second Circuit granted enforcement of the Board's order. The Court of Appeals had jurisdiction under Section

10(e) of the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

1. The order of the Second Circuit is in conflict with this Court's Decision in General Building Contractors Ass'n. v. Pennsylvania

This Court has recently held that employers, who have not intentionally discriminated against employees in a union's operation of hiring referrals, may not be held vicariously liable for a union's intentional discrimination in hiring referrals. In General Building Contractors Ass'n. v. Pennsylvania, 102 S.Ct. 1704 (June, 1982), the Court rejected the argument that an employer may be held liable for discrimination when hiring employees referred to him by a union when the employer did not know or have reason to suspect the union's discrimination.

The reasoning of the Court applies

equally to the instant case in that a union does not act as the employer's agent in operating the union hiring hall provided in the labor agreement.

In the instant case, the Board found Willets blameless for the discriminatory acts of its shop steward Worhacz, to whom Willets intentionally and knowingly delegated hiring authority. In essence, the Board holds that Willets could not find out about Worhacz' discriminatory acts--including falsified time sheets. Nonetheless, GCP is liable for Worhacz' acts because in hiring a truck and driver from Willets, it delegated hiring authority to Worhacz. GCP is liable because it should have known of Worhacz' acts.

In General Building Contractors, the union contract had contained an exclusive hiring hall. In the existing case, the Local 282 contracts have no hiring hall

provisions, Local 282 does not operate a hiring hall. The concept of a hiring hall would conflict directly with the long established shape and seniority system.

2. The decisions below must be reversed so as to avoid calamitous effect on the nation's commerce. They must be reversed for they do nothing to further the policies of the National Labor Relations Act.

If not reversed, the decision of the Court of Appeals and the Board will have a disastrous effect on the long established custom and practice of the construction industry, and, indeed, many other industries that rely on renting equipment with operators. The ability to rent and hire as needed is critically important in construction and other industries.

As is common in the construction industry, the multi-employer collective

agreements with Local 282 provide that the employer maintain a seniority list of its drivers and that the drivers shape the employer's barn or garage each morning and go to work in order of seniority.

This system benefits the employer who is assured a pool of drivers and it benefits the drivers who know when they are entitled to work. When, as often occurs, the employer rents his truck, one of his drivers goes with the truck--that gives the driver an additional work opportunity and the employer knows his driver will not abuse the truck. Both the employer and driver benefit from the additional work gained through rentals when the employer's truck would otherwise be idle. Other construction equipment is rented similarly. The employer to whom the manned truck is rented is spared the capital cost of the truck.

The decisions below will have a disastrous economic impact on the construction industry--and all industries that rely heavily on short-term rental of manned equipment.

In essence, the decisions below hold an employer vicariously liable when he obtains a worker from any source (union, other employer, employment agency, office temps) which unlawfully discriminates in referring a worker. Hiring in this common manner will be unacceptably perilous. Indeed, delegating hiring to lower management, such as foremen and job superintendants, will be risky business. The prudent employer will be compelled to do all hiring personally.

The decisions below must be reversed so as to avoid a calamitous effect on the nation's commerce. They must be reversed for they do nothing to further

the policies of the National Labor Relations Act.

3. This Court should resolve the conflict as to whether an employer can be held vicariously liable under 29 U.S.C. 158(a)(3) for a Union's discriminatory acts

The Court of Appeals struck new ground when it found that GCP was liable because it should have known or made inquiries about Worhacz' acts.

No Circuit has so held--not even the Second Circuit (although both the Board and the Second Circuit rely on Morrison-Knudsen Co. v. NLRB, 275 F. 2d 914, 917 (2d Cir. 1960), cert.denied, 366 U.S.909 (1961), for the rule that the employer is liable even though it is unaware of the union's discrimination. That holding was dictum in Morrison-Knudsen since the Court found that the employer had actual knowledge of some of the union's discriminatory acts.

Circuit Courts have not enforced Board orders against employers in cases involving union discrimination on the grounds that the employer had no actual knowledge of the union's discriminatory practices and no reason to make inquiries, Lummus Co. v. NLRB, 339 F. 2d 728 (DC Circuit 1964), NLRB v. Master Stevedores Ass'n. of Texas, 418 F. 2d 140 (CA-5 1969), NLRB v. American Postal Workers Union, 618 F.2d 1249, 1261 (CA-8, 1980), Shen Valley Meat Packers v. NLRB, 211 F. 2d 289 (CA-4, 1954), NLRB v. Mallory Co., 237 F.2d 437 (CA-7). In Fruin-Colnon Corp. v. NLRB, 571 F. 2d 1017 (CA-8, 1977), the Court granted enforcement against the employer but repeatedly emphasized that the employer clearly had actual knowledge of the union's discriminatory acts.

In short, no court case has been cited to support a finding of liability

where an employer had no knowledge, not even Pacific Maritime Ass'n. v. NLRB 452 F. 2d 8 (CA-9)(1971)relied on by the Second Circuit in this case.

Nor is there any authority to support the Second Circuit's ruling that Mascali is liable because it should have known or made inquiry.

The Court should resolve the conflict between the Board and Second Circuit on one hand and at least five other Circuit Courts on the other.

4. There is no substantial evidence that the employer delegated hiring authority

There is no substantial evidence that the GCP delegated hiring authority to the union or to Worhacz, the union's shop steward at Willets.

The only evidence shows that McFarland, the union's Business Agent, was concerned that GCP might hire owner-oper-

ators instead of Local 282 drivers. GCP told him that it would rent trucks with drivers from Mascali, Willets, et al., all union contractors. Nothing was said about delegating hiring authority, 282 Appendix A pages 48a, 49a. The written collective bargaining agreements between Local 282 and the industry do not provide for a hiring hall--the evidence shows that the industry practice is for drivers to shape at the employer's barn and work in order of seniority, which is quite different from a hiring hall system. Even if the "arrangement" was a hiring hall system, the Court recently held, in General Building Contractors Association, Inc. v. Pennsylvania, decided June 29, 1982, that, when a contractor obtains men through a union hiring hall, the relationship is not that of principal and agent--the contractor is not liable, under

respondeat superior, for the union's discrimination.

5. The Board impermissibly pyramided inference upon inference

The Board pyramided inference upon inference to find that GCP delegated hiring authority to the union.

Neither of the collective bargaining agreements between Local 282 and Mascali, Willets and the other contractors provide for a hiring hall and there was no testimony that Local 282 operated a hiring hall. All of the evidence showed that when the employer needed drivers, he telephoned other employers or asked drivers such as Daves, 282 Appendix A pages 207a, 209a, 210a.

The Board found, correctly, that GCP hired drivers by telephoning, in the following order: Mascali, Willets, Edenwald and Grace.

Then the Board equated contacting

Willets to contacting Worhacz, Local 282's shop steward at Willets, 282 Appendix A pages 207a, 208a, 209a.

Then the Board equated Worhacz with the union, thereby inferring that GCP's decision to telephone another employer, Willets, constituted a delegation of hiring authority to the union, 282 Appendix A page 221a.

The Board also adopted its Administrative Law Judge's (the "ALJ") inferences respecting the discussion between Charles Mascali of GCP and McFarland, the union's Business Agent, 282 Appendix A page 48a. Charles Mascali informed McFarland of his decision to have GCP hire trucks and drivers from Mascali, Willets, Edenwald and Grace. The ALJ inferred that this constituted an "arrangement", an oral collective bargaining agreement, with an exclusive union hiring hall provision, superseding the two written collective

bargaining agreements between Local 282 and Mascali, Willets, Edenwald, Grace and the rest of the industry. It should be noted that the exclusive hiring hall arrangement inferred by the ALJ applied only when GCP telephoned Worhacz, Local 282's shop steward at Willets. It could not apply if GCP telephoned Mascali or Grace or Edenwald because Worhacz had nothing to do with referrals of drivers from those firms.

The Board impermissibly pyramided inference upon inference.

> "While the Board is free to draw reasonable inferences from the evidence, direct and circumstantial, NLRB v. Melrose Processing Co., 351 F 2d 693, 699 (8th Cir. 1965), it may not build inferences upon inferences to reach a finding which is no more than educated conjecture." NLRB v. Garner Tool, 493 F.2d 263, 267 (CA-8 1974), NLRB v. Miami Coca Cola,222 F.2d 341, 344 (CA-5 1955)

6. The Order of the Second Circuit is in direct conflict with §10(c) of the National Labor Relations Act and federal policy on discrimination

Section 10(c) of the National Labor Relations Act, as amended, provides in part:

> Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him ...

As this language clearly indicates, Congress has contemplated that responsibility for acts of discrimination should fall solely upon the party who practices that discrimination. Indeed, that Congress intended to hold only the responsible party liable for back pay is evident by the use of the disjunctive "or" ..."as the case may be" in the amendment to §10 (c) above.

This principle comports with other

federal policy on discrimination. For example, in General Building Contractors Ass'n., supra, this Court found that under 42 U.S.C.1981 a union is solely responsible for its independent acts of discrimination in operating a hiring hall referral system. In Texas Dept. of Community Affairs v. Burdine, 450 U.S.248, 255, this Court again found that, under a Title VII action, the plaintiff has "the ultimate burden of persuading the court that she has been the victim of intentional discrimination."

Respectfully submitted,

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APPENDIX

National Labor Relations Act Section 8(a)(1)(3) 29 USC 158(a)(1)(3)

(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of

employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable

grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

National Labor Relations Act Section 10(c) 29 USC 160(c)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion

that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and

rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In

case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that Local 282, International Brotherhood of Teamsters ("the Union") violated the National Labor Relations Act ("the Act") by, *inter alia*, refusing to refer two employee dissidents, Charles Kurd and John Kuebler, for employment and ultimately securing their discharge from Willets Point Contracting Corporation ("Willets") (Pet. App. 221a, 165a, 61a-89a).[1] The Board further found that petitioners violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by accepting and

[1]The Union has filed a petition for a writ of certiorari (No. 82-94) contesting the Board's finding that it unlawfully secured Kurd's and Kuebler's discharges. Petitioners have not included the opinions of the Board or the court of appeals in the appendix to the instant petition; instead, they have referred to the appendix to the petition in No. 82-94. Accordingly, Pet. App. references herein are to the appendix in No. 82-94.

condoning a referral arrangement with the Union that discriminated against the dissident employees (Pet. App. 221a-223a, 127a). The relevant facts are as follows:

Petitioners obtained a contract to repair the Grand Central Parkway on Long Island, New York[2] (Pet. App. 47a). Petitioners did not have sufficient men or equipment to handle the job and therefore decided to hire additional personnel and equipment from other companies (*id.* at 47a-48a). Petitioners, who had a collective bargaining relationship with the Union, agreed to the request of the Union's business agent that when it needed additional drivers it would first call the Union's shop steward at Willets Point Contracting Corporation, Robert Worhacz (*id.* at 48a-50a).

On September 1, 1977, several months after the inception of the job referral arrangement with the Union, petitioners' job superintendent, Paternostro, called Worhacz to obtain additional drivers for the next day. Worhacz was unable to supply enough drivers and Paternostro, having turned to other sources, hired Kuebler at the suggestion of a source independent of the Union (Pet. App. 110a-111a). On September 2, Paternostro talked to Worhacz and informed him of Kuebler's hire. Worhacz informed Paternostro that he had enough drivers to send petitioners for the next working day and Kuebler should return to "shape" at Willets[3] (*id.* at 113a-115a). The next workday, September 6, Paternostro called Worhacz and obtained all the needed drivers. When Kuebler appeared at the jobsite and saw another Willets

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[2]Petitioner Frank Mascali Construction Co., Inc., established petitioner Frank Mascali Construction G.C.P. as a separate corporation to do the Parkway job (Pet. App. 48a). They are referred to collectively herein.

[3]Under the shape system, a company's drivers were required to appear at a designated place for job assignments, which were based primarily on seniority (Pet. App. 19a-20a).

driver there, he asked Paternostro why he had not been assigned to the truck. Paternostro explained the arrangement with the Union and said that he could not put Kuebler to work ahead of the drivers referred from Willets and that there was nothing he could do (*id.* at 115a). Thereafter, Kuebler attempted to obtain further employment with petitioners and explained his problems in obtaining referrals through Worhacz (*id.* at 123a-124a). His efforts were unsuccessful.

2. In finding that petitioners violated the Act by accepting and condoning the Union's discriminatory referral system, the Board acknowledged that, prior to September 2, 1977, petitioners had no knowledge of the Union's referral discrimination (Pet. App. 124a-126a). However, the Board concluded that, after Worhacz's September 2 conversation with Paternostro and Kuebler's subsequent conversations with petitioners' managerial personnel, petitioners "should have known, or make [sic] inquiries about, the discriminatory manipulation of the referral system and the shape system at Willets Point on and after September 2, 1977" (*id.* at 127a). The Board added (*id.* at 222a-223a) that, even if petitioners had "no actual knowledge of the Union's discrimination," it would bear responsibility because it delegated its hiring responsibilities to the Union.

The Board found that, but for the discriminatory administration of the referral system, both Kuebler and Kurd might have obtained work on petitioners' project (Pet. App. 224a-225a). However, the Board concluded that the Union, because of its greater responsibility, should be primarily liable, and petitioners only secondarily liable, for any backpay due Kuebler and Kurd due to discriminatory referrals[4] (*id.* at 223a-224a).

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[4]The Board dismissed the allegation that petitioners' failure to employ Kuebler as a permanent employee was unlawful (Pet. App. 214a-221a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-6a). The court explained (*id.* at 5a-6a):

> Mascali contends that it lacked knowledge of any discriminatory practices committed by the Union in connection with work referrals of the Willets employees. We and other courts have indicated that employees [sic] may be found to have violated Section 8(a)(3) if they delegate to unions the authority to supply workers, and the unions do so in a discriminatory manner, even if the employer is unaware of the discrimination. *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914, 917 (2d Cir. 1960), cert. denied, 366 U.S. 909 (1961); *Pacific Maritime Ass'n* v. *NLRB*, 452 F. 2d 8, 10 (9th Cir. 1971). We need not rest on this principle, however, since the ALJ found, upon adequate evidence of conversations of Worhacz and Kuebler with Mascali personnel, that Mascali should have known, or made inquiries about, the Union's discriminatory manipulation of the referral system, at least by September 2, 1977.

4. Petitioners contend (Pet. 7-9), in reliance on *General Building Contractors Association* v. *Pennsylvania*, No. 81-280 (June 29, 1982), that the Board erred in concluding that an employer who delegates hiring responsibility to a union may be held liable for the union's discrimination, even if the employer is unaware of the discrimination.[5] There is no necessity for the Court to reach that question here, however, for the Board, upheld by the court of

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[5] In *General Building Contractors*, the Court held that liability under 42 U.S.C. 1981, for racial discrimination in the operation by a union of an exclusive hiring hall, could not be imposed on employers obtaining employees from the hall without proof of intentional discrimination by the employers.

appeals, alternatively held that petitioners should have known, or made inquiries, about the Union's discriminatory administration of the referral system.[6] Resolution of that fact-bound question raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[7]

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[6]Petitioners also contend (Pet. 12-14) that they should not be held liable for the Union's discrimination merely because they should have known, or made inquiries, about the discriminatory administration, but that actual knowledge is required for liability. The cases cited by petitioners (Pet. 13-14) do not support that assertion. Thus, in *Pacific Maritime Association* v. *NLRB*, 452 F. 2d 8, 10 (9th Cir. 1971), the court held that there was sufficient evidence of employer knowledge where there were facts which "should have put [it] on notice" (citing *NLRB* v. *Houston Maritime Association*, 337 F. 2d 333, 336 (5th Cir. 1964)). Accord, *NLRB* v. *Master Stevedores Association*, 418 F. 2d 140, 142 (5th Cir. 1969) (employers are responsible for discriminatory acts of union "where they know or reasonably should know of the discriminatory acts"); *Lummus Co.* v. *NLRB*, 339 F. 2d 728, 737 (D.C. Cir. 1964) (employer is liable where it "may reasonably be charged with notice"). In *Fruin-Colnon Corp.* v. *NLRB*, 571 F. 2d 1017, 1020 (8th Cir. 1978) the court upheld the Board's finding that the employer was responsible for the union's discrimination where it "had sufficient knowledge, which any reasonable employer would have exercised, to question [the union's termination decisions]." In *NLRB* v. *American Postal Workers Union*, 618 F. 2d 1249, 1261 (8th Cir. 1980), the court found the employer not responsible for the union's discrimination because "[t]he only reasonable conclusion from the evidence" was that the employer thought it was required by the collective agreement to accede to the union's demand. *NLRB* v. *Mallory & Co.*, 237 F. 2d 437, 442-444 (7th Cir. 1956), does not involve the issue of employer responsibility for union discrimination since the court found that the union had not acted discriminatorily and went on to decide whether the employer independently acted unlawfully. Similarly, in *NLRB* v. *Shen-Valley Meat Packers, Inc.*, 211 F. 2d 289, 292-293 (4th Cir. 1954), the court found that neither the union nor the employer had acted discriminatorily.

[7]Petitioners also challenge (Pet. 14-18) the substantiality of the evidence to support the finding that it delegated hiring authority to the Union. That question too raises only evidentiary issues.

Petitioners also challenge (Pet. 19-20) the Board's order making them secondarily liable for any backpay to which Kuebler and Kurd might be entitled because of discriminatory referrals.[8] In so contending, petitioners simply reassert their argument that they can not be held liable for the discrimination merely because they should have known or made inquiries about the discriminatory referral practice but are liable only if they actually were aware of it. As shown (see note 6, *supra*), the courts have uniformly held employers liable for discriminatory employment practices of unions where the facts known to the employers should have put them on notice about such practices.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

OCTOBER 1982

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[8]The Board's practice is to hold a party only secondarily liable where there are circumstances mitigating its responsibility for the unlawful practice. See, *e.g.*, *Bulletin Co.*, 181 N.L.R.B. 647 & n.3 (citing cases) (1970), enforced, 443 F. 2d 863 (3d Cir. 1971); *J. Willes & Son Masonary*, 191 N.L.R.B. 872, 875 (1971); *Union Bleacher Co.*, 245 N.L.R.B. 719 n.3 (1979). Petitioners do not contest this practice; rather, they maintain that they should not be liable at all for backpay due to discriminatory referrals.

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IN THE

Supreme Court of the United States

October Term 1982

FRANK MASCALI CONSTRUCTION G.C.P. CO. and
FRANK MASCALI CONSTRUCTION CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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of New York, Inc.
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PARTIES IN THE COURT OF APPEALS

1. Frank Mascali Construction G.C.P. Co.*
2. Frank Mascali Construction Co., Inc.*
3. National Labor Relations Board
4. John Kuebler
5. Charles Curd
6. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

*Frank Mascali Construction Co., Inc. is the managing partner of, and owns a one-third interest in Frank Mascali Construction G.C.P.Co., a joint venture.

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ARGUMENT

In its Memorandum In Opposition, the Board incorrectly states (Point 4, p. 4, 5) that this case does not raise the question of whether National Labor Relations Act sections 8(a)(1) and (3) render an employer liable for union discrimination against an employee where the employer did not know of, and could not have learned of the union's discrimination.

In support of its contention, the Board relies on the language of the Second Circuit Court of Appeals which it quotes (p. 4). The Board says (p.4, 5) that this Court should not consider Petitioners' question because:

> "the Board, upheld by the court of appeals, alternatively held that petitioners should have known, or made inquiries, about the Union's discriminatory administration of the referral system."

By the word "alternatively", the Board admits that the Court of Appeals imposed liability although Petitioners lacked knowledge.

As is evident from the language quoted by the Board at page 4, the Court of Appeals found that, based on Mascali conversations with Kuebler (the discriminatee) and Worhacz (union shop steward for another employer), Mascali:

> "should have known, or made inquiries about, the Union's discriminatory manipulation of the referral system, at least by September 2, 1977."

Those conversations took place on September 2 and 7, (126a, 127a). The Board agreed with the ALJ that prior to September 2, Mascali had no actual knowledge of and no reason to inquire about the Union's discrimination (221a, 222a).

The Board also found that

Mascali's "failure to employ Kuebler after September 2 was unrelated to union considerations and therefore not discriminatory" (220a); and that,

> "even if Respondent Employers had investigated ... they would not have discovered the discriminatory practices ..." (223a, 224a).

Had the Court of Appeals held Mascali liable because it knew of or had reason to investigate the Union's acts on September 2nd, that court would have modified the Board's order to reduce Mascali's liability to the period beginning September 2nd (224a).

However, the Court also upheld Petitioners' backpay liability from July 25 to September 1, 1977--the period when the ALJ, Board and Court of Appeals agree Petitioners had no knowledge.

Clearly, the Board and Court of Appeals have ruled that Mascali vio-

lated sections 8(a)(1) and (3) although Mascali had no knowledge of the Union's discriminatory practices. The Board and Court of Appeals expressly so held.

Therefore, the question framed by Petitioners is appropriately raised for review by this Court.

Respectfully submitted,

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